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10/523,566

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Kazuhiro Yagishita

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LADAS & PARRY LLP
224 SOUTH MICHIGAN AVENUE
SUITE 1600
CHICAGO, IL 60604

EXAMINER

GOLOBOY, JAMES C

ART UNIT

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/523,566	Applicant(s) YAGISHITA, KAZUHIRO	
	Examiner James Goloboy	Art Unit 1714	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 February 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date <u>See Continuation Sheet</u> . | 6) <input type="checkbox"/> Other: _____ |

Continuation of Attachment(s) 3). Information Disclosure Statement(s) (PTO/SB/08), Paper No(s)/Mail Date :2/23/05, 4/28/05, 7/13/06, 8/21/06, 2/26/07. ✓

DETAILED ACTION

Claim Objections

1. Claims 5-9 and 11 are objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim cannot depend from another multiple dependent claim. See MPEP § 608.01(n). In the interest of compact prosecution, rejections of these claims based on prior art have been set forth below and apply pending rectification of the improper claims.

Use Claims

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 8-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

4. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

5. Claims 8-11 provide for the use of a composition, but, since the claim does not set forth any steps involved in the method/process, it is unclear what method/process

Art Unit: 1714

applicant is intending to encompass. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced.

Claims 8-11 are rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101. See for example *Ex parte Dunki*, 153 USPQ 678 (Bd.App. 1967) and *Clinical Products, Ltd. v. Brenner*, 255 F. Supp. 131, 149 USPQ 475 (D.D.C. 1966).

In order to overcome this rejection, it is advised that the applicant change "used" language in Claims 8-11 to "process of using", and add process steps. Applicant is additionally advised to ensure that claims 8 and 11 are differentiated from each other.

Double Patenting

6. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Art Unit: 1714

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

7. Claims 1-9 and 11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-12 of copending Application No. 11/048,573 in view of Campbell (U.S. Pat. No. 5,415,792).

Claim 1 of the '573 application recites a lubricating composition containing an alkyl salicylate meeting the limitations of claims 1-4 of the current application (salicylate (I) of the '573 application meets claims 3 and 4). Claim 8 of the '573 application requires the composition to have less than 0.05% by weight of sulfur, therefore meeting the sulfur content requirements of claims 1 and 5 of the current application. Claim 9 of the '573 application discloses the use of the oil in an internal combustion engine, as in claim 9 of the current application. Claims 3-4 of the '573 application require the antiwear additive to be sulfur-free, therefore rendering claims 6-7 of the current application obvious. The difference between the claims of the '573 application and the current claims is therefore that the '573 application does not disclose the use of the lubricant in an internal combustion engine under conditions where the water content in the composition becomes 200 ppm or more by mass.

Campbell teaches in column 1 lines 9-10 that the salicylates impart water tolerance to lubricating compositions, and in column 10 lines 32-61 gives an example where the hydrolytic stability of the lubricant is tested in a composition containing 2% by weight of water (lines 44-45). The conclusion was that the lubricant composition was hydrolytically stable, and little formation of solid residues occurred (lines 57-61).

Art Unit: 1714

It would have been obvious to one of ordinary skill in the art to use the lubricating composition of the '573 application in conditions where the water content in the composition becomes 200 ppm or more by mass, as Campbell teaches that the composition is hydrolytically stable.

This is a provisional obviousness-type double patenting rejection.

8. Claims 1-9 and 11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-16 of copending Application No. 11/048,441 in view of Campbell.

The '441 application recites a lubricating oil composition comprising a salicylate detergent. Salicylate A-3 of claim 2 of the '441 application meets the limitations of the salicylates of claims 1-4 of the current application. Claim 12 of the '441 application requires the composition to have less than 0.05% by weight of sulfur, therefore meeting the sulfur content requirements of claims 1 and 5 of the current application. Claim 13 of the '441 application discloses the use of the oil in an internal combustion engine, as in claim 9 of the current application. Claims 7-8 of the '441 application require the antiwear additive to be sulfur-free, therefore rendering claims 6-7 of the current application obvious.

The difference between the claims of the '441 application and the current claims is therefore that the '441 application does not disclose the use of the lubricant in an internal combustion engine under conditions where the water content in the composition becomes 200 ppm or more by mass.

Art Unit: 1714

Campbell teaches in column 1 lines 9-10 that the salicylates impart water tolerance to lubricating compositions, and in column 10 lines 32-61 gives an example where the hydrolytic stability of the lubricant is tested in a composition containing 2% by weight of water (lines 44-45). The conclusion was that the lubricant composition was hydrolytically stable, and little formation of solid residues occurred (lines 57-61).

It would have been obvious to one of ordinary skill in the art to use the lubricating composition of the '441 application in conditions where the water content in the composition becomes 200 ppm or more by mass, as Campbell teaches that the composition is hydrolytically stable.

This is a provisional obviousness-type double patenting rejection.

9. Claims 1-9 and 11 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-10 of copending Application No. 11/462,340 in view of Campbell.

The '340 application recites a lubricating oil composition comprising a salicylate detergent. Salicylate A-3 of claim 2 of the '340 application meets the limitations of the salicylates of claims 1-4 of the current application. Claim 1 of the '340 application requires the composition to have less than 0.3% by weight or less of sulfur, therefore encompassing the ranges of sulfur content recited in claims 1 and 5 of the current application. Claim 9 of the '340 application discloses the use of the oil in an internal combustion engine, as in claim 9 of the current application. Claims 6-7 of the '340

Art Unit: 1714

application require the antiwear additive to be sulfur-free, therefore rendering claims 6-7 of the current application obvious.

The difference between the claims of the '340 application and the current claims is therefore that the '441 application does not disclose the use of the lubricant in an internal combustion engine under conditions where the water content in the composition becomes 200 ppm or more by mass.

Campbell teaches in column 1 lines 9-10 that the salicylates impart water tolerance to lubricating compositions, and in column 10 lines 32-61 gives an example where the hydrolytic stability of the lubricant is tested in a composition containing 2% by weight of water (lines 44-45). The conclusion was that the lubricant composition was hydrolytically stable, and little formation of solid residues occurred (lines 57-61).

It would have been obvious to one of ordinary skill in the art to use the lubricating composition of the '340 application in conditions where the water content in the composition becomes 200 ppm or more by mass, as Campbell teaches that the composition is hydrolytically stable.

This is a provisional obviousness-type double patenting rejection.

10. Claim 10 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-12 of copending Application No. 11/048,573 in view of Campbell as applied to claims 1-9 and 11 above, and further in view of Curtis (U.S. PG Pub. No. 2003/0220209).

Art Unit: 1714

The discussion of the '573 application in view of Campbell in paragraph 7 above is incorporated here by reference. The '573 application and Campbell discloses a lubricating composition used in an internal combustion engine meeting the limitations of claim 9 but does not disclose an internal combustion engine using fuel having a sulfur content of 50 ppm or less.

Curtis, in paragraphs 5-9, discloses an engine lubricated with a lubricant comprising a detergent. In paragraph 50 Curtis discloses that the detergent can be a salicylate, such as the salicylate of Campbell. In the reference's claim 1 Curtis discloses that the engine can use a low-sulfur diesel fuel, and in paragraph 12 teaches that a low-sulfur diesel contains 15 ppm or less of sulfur, falling within the range recited in claim 10.

It would have been obvious to one of ordinary skill in the art to use the salicylates of the '573 application and Campbell in the lubricant for an engine using low-sulfur fuel of Curtis, as Campbell teaches that the salicylates are useful in internal combustion engines and Curtis teaches that they are useful in engines that take low-sulfur fuel.

This is a provisional obviousness-type double patenting rejection.

11. Claim 10 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-12 of copending Application No. 11/048,441 in view of Campbell as applied to claims 1-9 and 11 above, and further in view of Curtis (U.S. PG Pub. No. 2003/0220209).

Art Unit: 1714

The discussion of the '441 application in view of Campbell in paragraph 7 above is incorporated here by reference. The '441 application and Campbell discloses a lubricating composition used in an internal combustion engine meeting the limitations of claim 9 but does not disclose an internal combustion engine using fuel having a sulfur content of 50 ppm or less.

Curtis, in paragraphs 5-9, discloses an engine lubricated with a lubricant comprising a detergent. In paragraph 50 Curtis discloses that the detergent can be a salicylate, such as the salicylate of Campbell. In the reference's claim 1 Curtis discloses that the engine can use a low-sulfur diesel fuel, and in paragraph 12 teaches that a low-sulfur diesel contains 15 ppm or less of sulfur, falling within the range recited in claim 10.

It would have been obvious to one of ordinary skill in the art to use the salicylates of the '441 application and Campbell in the lubricant for an engine using low-sulfur fuel of Curtis, as Campbell teaches that the salicylates are useful in internal combustion engines and Curtis teaches that they are useful in engines that take low-sulfur fuel.

This is a provisional obviousness-type double patenting rejection.

12. Claim 10 is provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-12 of copending Application No. 11/462,340 in view of Campbell as applied to claims 1-9 and 11 above, and further in view of Curtis (U.S. PG Pub. No. 2003/0220209).

Art Unit: 1714

The discussion of the '340 application in view of Campbell in paragraph 7 above is incorporated here by reference. The '340 application and Campbell discloses a lubricating composition used in an internal combustion engine meeting the limitations of claim 9 but does not disclose an internal combustion engine using fuel having a sulfur content of 50 ppm or less.

Curtis, in paragraphs 5-9, discloses an engine lubricated with a lubricant comprising a detergent. In paragraph 50 Curtis discloses that the detergent can be a salicylate, such as the salicylate of Campbell. In the reference's claim 1 Curtis discloses that the engine can use a low-sulfur diesel fuel, and in paragraph 12 teaches that a low-sulfur diesel contains 15 ppm or less of sulfur, falling within the range recited in claim 10.

It would have been obvious to one of ordinary skill in the art to use the salicylates of the '340 application and Campbell in the lubricant for an engine using low-sulfur fuel of Curtis, as Campbell teaches that the salicylates are useful in internal combustion engines and Curtis teaches that they are useful in engines that take low-sulfur fuel.

This is a provisional obviousness-type double patenting rejection.

Claim Rejections - 35 USC § 102

13. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Art Unit: 1714

14. Claims 1-2, 5, 8-9, and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Campbell (U.S. Pat. No. 5,415,792).

In column 2 lines 11-62, Campbell discloses an overbased alkylated alkyl salicylate suitable for use as a lubrication oil additive. Attention is drawn to the structure presented in column 2 lines 31-39 and description in column 2 lines 40-42, where Campbell teaches that the salicylate may have one or two alkyl groups, as in the salicylate recited in claim 1. From column 5 line 64 through column 6 line 4, Campbell teaches that the salicylate can be used in a concentrate comprising from 5 to 95% by weight of the salicylate, anticipating the 5% endpoint of the range recited in claim 1.

From column 9 line 64 through column 10 line 4, Campbell discloses a lubricating composition comprising the salicylate and a phosphorus-containing antiwear agent (zinc dithiophosphate. While the amount of sulfur in the composition is not explicitly stated, zinc dithiophosphate is the only sulfur-containing component and has a sulfur:phosphorus weight ratio of approximately 2:1, yielding a sulfur content of 0.1% by weight for the composition, within the ranges recited in claims 1 and 5.

In light of the above, the compositions of claims 1-2 and 5 are clearly anticipated by the composition of Campbell.

In columns 9-10 (Examples 5-6), the lubricating composition is used in examples where the water content is 1% and 2% respectively, well within the range recited in claim 8. In column 1 lines 2-5 Campbell discloses that the composition is usable in internal combustion engines, meeting the limitation of claim 9. Campbell teaches in column 1 lines 9-10 that the salicylates impart water tolerance to lubricating

Art Unit: 1714

compositions, and in column 10 lines 32-61 gives an example where the hydrolytic stability of the lubricant is tested in a composition containing 2% by weight of water (lines 44-45). The conclusion was that the lubricant composition was hydrolytically stable, and little formation of solid residues occurred (lines 57-61).

Claim Rejections - 35 USC § 103

15. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

16. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

17. Claims 1-2, 5, 8-9, and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Campbell.

The discussion of Campbell in paragraph 14 above is incorporated here by reference. The difference between Campbell and the currently presented claims is that

Art Unit: 1714

Campbell does not disclose a composition comprising from 0.005 to 5% by weight of the salicylate additive.

Campbell teaches in column 2 lines 57-62 that the composition can contain from about 2 to about 30% by weight of the salicylate, overlapping the range recited in claim 1. See MPEP 2144.05(I): "In the case where the claimed ranges "overlap or lie inside ranges disclosed by the prior art" a prima facie case of obviousness exists. *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976);"

18. Claims 3-4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Campbell in view of Chambard (U.S. PG Pub. No. 2002/0082176).

The discussions of Campbell in paragraphs 14 and 17 above are incorporated here by reference. Campbell discloses a lubricating composition meeting the limitations of claim 1, but does not disclose the specific salicylates of claims 3 and 4. More specifically, Campbell does not disclose the possibility of an alkyl substituent with fewer than 10 carbon atoms.

In paragraphs 8-11, Chambard discloses a lubricating composition comprising an overbased detergent, which is used for a diesel engine. In paragraphs 36-52 Chambard describes the overbased detergent. In paragraph 52 Chambard discloses that the preferred detergent is calcium salicylate. In paragraph 50 Chambard discloses that the alkyl groups of an alkylsalicylate advantageously contain 5 to 100 carbon atoms, and that when two alkyl groups are present, the average number of carbon atoms in the alkyl groups is at least 9. Based on this teaching, it would be obvious to one of ordinary

Art Unit: 1714

skill that when R^1 is a smaller alkyl group (5-9 carbon atoms), R^2 should be a larger alkyl group (10 or more carbon atoms. Similarly, when R^1 is a larger alkyl group, R^2 can be a smaller alkyl group. Therefore, the salicylates of claims 3-4 are rendered obvious by Chambard.

It would have been obvious to one of ordinary skill in the art to use the salicylates of Chambard as the salicylates of Campbell, as Chambard teaches that they are oil-soluble salicylates, and useful when the lubricating composition is used for a marine diesel engine.

19. Claims 6-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Campbell in view of Papay (U.S. Pat. No. 5,652,201).

The discussions of Campbell in paragraphs 14 and 17 above are incorporated here by reference. Campbell discloses a lubricating oil composition meeting the limitations of claim 1 and containing a zinc dithiophosphate antiwear agent.

Papay teaches in column 1 lines 41-54 that the elimination of zinc is environmentally advantageous, and in columns 43-44 discusses suitable metal-free antiwear agents for a lubricant composition, meeting the limitations of claim 6. In addition, the vast majority of these antiwear agents do not contain sulfur, and therefore their use in the composition of Campbell meets the limitation of claim 7.

It would have been obvious to one of ordinary skill in the art to replace zinc dithiophosphate with use the metal-free antiwear agents of Papay in the composition of

Art Unit: 1714

Campbell in order to provide a more environmentally friendly composition, as taught by Papay.

20. Claim 9 is rejected under 35 U.S.C. 103(a) as being unpatentable over Campbell in view of Curtis (U.S. PG Pub. No. 2003/0220209):

The discussions of Campbell in paragraphs 14 and 17 above are incorporated here by reference. Campbell discloses a lubricating composition used in an internal combustion engine meeting the limitations of claim 9 but does not disclose an internal combustion engine using fuel having a sulfur content of 50 ppm or less.

Curtis, in paragraphs 5-9, discloses an engine lubricated with a lubricant comprising a detergent. In paragraph 50 Curtis discloses that the detergent can be a salicylate, such as the salicylate of Campbell. In the reference's claim 1 Curtis discloses that the engine can use a low-sulfur diesel fuel, and in paragraph 12 teaches that a low-sulfur diesel contains 15 ppm or less of sulfur, falling within the range recited in claim 10.

It would have been obvious to one of ordinary skill in the art to use the salicylates of Campbell in the lubricant for an engine using low-sulfur fuel of Curtis, as Campbell teaches that the salicylates are useful in internal combustion engines and Curtis teaches that they are useful in engines that take low-sulfur fuel.

Conclusion

Art Unit: 1714

21. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Inoue (U.S. Pat. No. 5,380,508) discloses a calcium borate overbased salicylate detergent where the benzene ring of the salicylate can be substituted with two alkyl groups.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to James Goloboy whose telephone number is 571-272-2476. The examiner can normally be reached on M-F 8-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vasu Jagannathan can be reached on 571-272-1119. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Application/Control Number: 10/523,566

Page 17

Art Unit: 1714

James C. Coldrey
JCG

Van Jagannathan
VASU JAGANNATHAN
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700